

COPY in 115

1958

November 20

NEW HAMPSHIRE LAW LIBRARY

OCT 01 1998

CONCORD, N.H.

Mr. Adelard R. Cote, Commissioner
Department of Labor
State House
Concord, New Hampshire

Dear Mr. Cote:

This will acknowledge your letter of October 23, 1953, in which you request an opinion as to whether a policy of Workmen's Compensation Insurance issued to the prime contractor on a project would cover employees of a subcontractor.

We answer in the negative. Under the terms of our Workmen's Compensation Act (RSA 281) there can be no recovery for an injury sustained during the course of employment unless the relationship of employee-employer existed between the injured workman and the person against whom he makes claim for compensation. The letting of a subcontract by a prime contractor does not in and of itself give rise to an employee-employer relationship between subcontractor's employees and the prime contractor. Generally speaking such workmen remain the employees of the subcontractor and are entitled to recover compensation, if at all, only against him.

This case was fully considered in the case of Manoch v. Company, 86 N.H. 104. In that case a man named Manoch was employed by his father and the father entered into an agreement with the defendant whereby the father loaned a truck and his son as the driver to the defendant at an agreed hourly rate. The son was killed in an accident arising out of his employment and a petition for compensation was brought on behalf of his beneficiaries against the defendant. The court found that at the time of the accident resulting in Manoch's death he was performing duties of such nature that he was under the direction and control of his general employer, his father, and was not directly engaged in the defendant's work. Consequently, it was held that since at the time of the accident he was in the employee of the subcontractor he could not recover compensation from the general contractor, the defendant. The following quotations from the opinion of the court in that case clearly indicate the basis of the decision:

Mr. Adelard E. Cote, Commissioner

"This is a proceeding to recover compensation under chapter 178 of the Public Laws. By the terms of that statute recovery of compensation thereunder is limited to employees of the defendant. . . ."

"It is evident that the accident resulted directly and solely from the operation of the decedent's truck. There was either a defective brake or a good brake insufficiently set. Unless the decedent was the defendant's servant as to these details of his work there can be no recovery here. Much stress has been laid upon the fact that as to manner and place of loading, etc., the defendant was in control. The flaw in the argument lies in its failure to recognize that the decedent occupied dual relations in what he did. He was the defendant's servant only as far as the right to control his actions was surrendered to the defendant. As to actions where the defendant did not have the right of control he remained his father's servant. . . ."

"Additional assurance that the foregoing conclusion is a correct statement of the legislative intent is found in the history of the statute. The only precedent available when the act was passed in 1911 was the English statute. Gunn v. Company, 83 N.H. 392. That statute contained a detailed provision for compensation liability to the servants of an independent contractor. 6 B.W. VII, c. 53, s. 4. While a similar provision was inserted in the Massachusetts act adopted the same year (Centrollo's Case, 232 Mass. 456), there is nothing of the kind to be found in our statute. There was an evident purpose not to extend liability beyond the relation of master and servant, as that relation had theretofore been defined and was then understood. . . ."

As indicated by the opinion in the Manoch case, an employee of a subcontractor could become the employee of the prime contractor for a limited time or purpose if he were loaned to the prime contractor under such circumstances that the prime contractor had the right to exercise direction and control over him in the performance of his duties. Of course circumstances will vary from case to case but if the facts are such in a given case that it is found that the subcontractor's employee had in fact been loaned to the prime contractor who had the right to exercise general supervision over him he would then in fact become an employee of the prime contractor, if only for a limited time or purpose, and if he then sustained an injury during the course of such

C O P Y

Mr. Adelard E. Cote, Commissioner

-3-

employment he could recover compensation from the prime contractor.

Sincerely yours,

John J. Zimmerman
Assistant Attorney General

JJZ/lt